LEE WAH BANK LTD.

v.

CHI LIUNG HOLDINGS SDN. BHD.

FEDERAL COURT, KUALA LUMPUR
ABDUL HAMID OMAR CJ (MALAYA)
MOHD. AZMI FJ
SYED AGIL BARAKBAH FJ
[CIVIL APPEAL NO. 291 OF 1983]
16 JUNE 1984

CONTRACT: *Sale and purchase agreement of business premises - Whether sale inclusive of exterior wall - Installation of ATM through exterior wall - Whether consent of vendor necessary - Whether installation within meaning of "alteration" and "improvement" - Proprietorship of exterior wall - Whether with purchaser - Installation of signboards and logo - Whether purchaser entitled to install without consent of vendor - Meaning of "competent authorities".*

By an agreement dated 17 November 1980, the respondents agreed to sell to the appellants a parcel of business premises within Chi Liung Plaza, a multi-storey building complex to be erected in Klang, for their banking business. After the premises were completed but before occupation of the premises, the appellants decided to install an Automated Teller Machine (ATM) facing the corridor of the main entrance of the Plaza and their signboards and logo with neon and spot lights on the exterior wall surrounding their premises. The respondents approved the installations subject to the payment of an annual rent. The appellants applied under O. 5 r. 4(2) RHC 1980 for a declaration that upon the true construction of the sale agreement, they were entitled to install the ATM without approval of any person or body and to install the signboards and logo subject only to the approval of the relevant government or local municipal authority. The application was dismissed by the High Court. The appellants appealed.

Held:

[1] The installation of the ATM through the wall facing the corridor of the main entrance required the consent of the respondents.

(a) By virtue of s. 5.14 of the sale agreement, making a hole through the wall and installing the ATM in the manner proposed was an "alteration" or "improvement" which required the consent of the respondents.

(b) Further, the appellants had no proprietary rights to the exterior part of the wall except such rights as might be provided in the sale agreement. The ownership remained with the respondents. Under s. 155 of the National Land Code, where an application for subdivision has been approved and the Chief Surveyor has to prepare a plan, it is provided by sub-section (3) that the centre of the floor wall or ceiling, as the case may be, is to be taken to be the boundary of any parcel of a building with any other parcel or with any part of the building which is not included in any of the parcels. The burden was on the appellants to show that the common boundary was not the centre of the wall.

[2] Regarding the installation and display of the signboards and logo on the exterior wall of the premises but not on any other part of the Plaza, s. 7.04 of the agreement specifically confers such a right on the appellants. The approval of "competent authorities" is required

by that section but "competent authorities" referred to government or local authorities competent to approve and regulate the display of the signboards and logo on commercial buildings and not the respondents. The words must be given their ordinary meaning.

[High Court order regarding installation of ATM confirmed. Appeal regarding installation and exhibition of signboards and logo allowed. Each party to bear own costs.]

Cases referred to:
Bickmore v. Dimmer [1903] 1 Ch D 158
Sturge v. Hackett [1962] 3 All ER 166
Brazier v. Skipton Rock Co. Ltd. [1962] 1 All ER 955
Gibson v. Skibs A/S. Marina [1966] 2 All ER 476

Legislation referred to:
National Land Code 1965, s. 155(3), 364
Rules of the High Court 1980, O. 5 r. 4(2)

Other sources referred to:
Shorter Oxford English Dictionary
Oxford Companion to Law

For the appellants - Porres P. Royan; M/s. Shook Lin & Bok
For the respondents - Rahim Noor (G.T. Rajan with him); M/s. G.T. Rajan & Co.

JUDGMENT

Mohd. Azmi FJ:

The main issue in this appeal is whether the appellants are entitled to the exterior wall of a parcel of business premises within Chi Liung Plaza which they purchased from the respondents by agreement dated 17 November 1980 at the price of RM1.5 million. By the said agreement the respondents agreed to sell the said premises to the appellants for their banking business in the Plaza, a multi-storey building complex to be erected along Jalan Meru, Klang. The premises agreed to be sold was defined under paragraph (g) s. 1.01 of the agreement to mean "collectively all that parcel of business premises as a shell unit on the ground floor measuring in area approximately three thousand and five hundred (3,500) sq. ft. and the first floor measuring in area approximately one thousand and five hundred (1,500) sq. ft. both delineated and shaded in red in the Floor Plans". The respondents being the registered proprietor of the land on which the Plaza was to be erected would apply for necessary approval under the National Land Code for subdivision and separate subsidiary and strata titles. The said land was defined under para. (c) of s. 1.01 to mean, "all the lands known as Certificate of Title 25305-25316 for Lot Nos 98-109 in the Town of Klang excluding such portion or portions of the lands as may be surrendered or sold to any Appropriate Authority from time to time" and the term "Appropriate Authority" was defined to mean, "any governmental, semi or quasi-governmental and/or statutory departments, agencies or bodies". As to service charges, the amount should be determined by the respondents before the issue of subsidiary titles and by the Management Corporation as provided under s. 364 of the National Land Code after the issue thereof. It was also agreed in the agreement that in the event the application for subsidiary title was rejected by the Appropriate Authority, "the sale and purchase herein shall be deemed to be mutually determined by the parties" and in place thereof the respondents should grant to the appellants a registrable lease of 30 years to be automatically renewed for successive terms for 30 years each for so long as it was lawfully permissible. To cut the story short, the business section of the Plaza including

the premises sold were completed and the appellants were advised by the respondents to enter into occupation on 6 May 1982 without waiting for the formal issue of Certificate of Fitness by Klang Municipal Council. Before occupying the premises, the appellants decided to install an Automated Teller Machine (ATM) facing the corridor of the main entrance of the Plaza, and it was common ground that for such installation a rectangular hole had to be made through the wall separating the appellants' parcel of premises from the corridor which was a main common area in the business complex. We take judicial notice of the fact that the ATM was a comparatively new gadget introduced by banking institutions to enable depositors to withdraw money at any time within and without banking hours, and in this particular case its installation would have benefited the appellants' customers who would be able to withdraw their money at any time from the main corridor of the Plaza. The appellants also wanted to install their signboards and logo with neon or spot lights on the exterior wall above the ATM and other parts of the exterior wall surrounding their premises. On 5 April 1982 Mr. David Siew, the senior manager of appellant bank wrote to Dato Harry Tong Lee Hwa, the chairman and managing director of Chi Liung Holdings Sdn. Bhd. (respondent/ vendor) to recall the respondents' approval in principle to the various installations which the bank intended to carry out on the exterior wall of the premises. Apart from confirming the nature and site of the proposed installations the appellants also undertook to make good all works damaged arising from such installations (See Ex. CSS2 at p. 36). By letter dated 6 May 1982, Dato Harry Tong conveyed the agreement of the respondents to the proposed installations subject to payment of annual rentals. The letter - Ex. CSS3 at p. 38 - is now reproduced:

The Property Manager
Lee Wah Bank Limited
Medan Pasar
Kuala Lumpur

Attn: **Mr. Kong Hai Choon**

Lee Wah Bank Premises in Chi Liung Plaza

With reference to your letter dated 23 April 1982, we are to inform you that after due consideration we have decided to allow you to install the various requests as per your letter dated 5 April 1982. The above installations are approved subject to your payment of a lump sum rental of RM20,000 per annum and a sum of RM5,000 being the deposit. If you are agreeable, kindly confirm by signing the duplicate copy of this letter and return to us.

After which you may make the said installations and the rental will commence with effect from 1 June 1982.

As you are aware that we have submitted for the application of the Certificate of Fitness about a month ago, soon after our meeting with the Municipal President Tunku Zubir in which you were also present. The indication given by Tunku Zubir was that as soon as the submission for the Certificate of Fitness is done, you are allowed to move in. However, the Local Authorities have already made several inspections of the complex and they are quite satisfied with the completion basing on the Certificate of Completion issued by our Chartered Architect M/s. Goh Hock Guan & Associates. In view of the above, we will advise your bank to move in any time as the formality of issuing the Certificate of Fitness may take some time.

Yours faithfully

CHI LIUNG HOLDINGS SDN. BHD.
Sgd. DATO HARRY TONG LEE HWA
Chairman/Managing Director.

The appellants did not agree to payment of rent for the use of the exterior wall. By August 1982, the matter was referred by the parties to their respective solicitors for interpretation of the 1980 sale agreement. The stand taken by the appellants as contained in their letter dated 5 August 1982 (Ex. CSS4 at p. 39) was expressed in the following relevant paragraphs:

> 3. In respect of the installation of the ATM on the exterior wall of our clients premises, s. 5.14 of the Sales Agreement (if at all it is applicable) does not entitle your client to levy a rental as condition for their consent for such installation. Hence your clients insistence on the payment of rental as condition for their consent can only be construed to mean that they are unreasonably withholding their consent.
>
> 4. We further draw your attention to s. 7.04 of the Sales Agreement which explicitly entitles our clients to exhibit their signboard or logo on the exterior of their premises subject only to the approval of the competent authorities. The right of your clients to levy a rent for such use in neither expressed nor can be implied in the same agreement. Furthermore, our clients need not seek your clients approval for such use as your clients do not fall into the category of "competent authorities" as envisaged under s. 7.04 of the agreement.
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> 5. We are instructed to notify your clients that our clients will be moving their branch business to their aforesaid premises during the first week of August 1982. In pursuance of that they are proceeding to exhibit their logo and install the ATM on the exterior of their premises as provided for in the agreement. Any obstruction on the part of your clients and/or their servants or agents preventing our clients from exhibiting the same would amount to a breach of agreement on the part of your clients and no doubt our clients will hold your clients liable for all consequential losses.

Needless to say the respondents did not agree to the interpretation placed by the appellants on s. 5. 14 and s. 7.04 of the sale agreement, and by letter dated 13 August 1982 (Ex. CSS5 at p. 41) the appellants were notified not to take any unilateral act. It was the respondents' contention that ss. 5.14 and 7.04 read with s. 5.11 did not give the appellants any right to the exterior wall and the respondents had absolute right to impose any restriction or condition for whatever reason in the use of the exterior wall by the appellants. Further, they contended that there was nothing in the agreement to prohibit the respondents from imposing rentals as a condition of giving their consent for the use of the wall. As a result of the impasse, the appellants stopped work on the installation of the ATM as proposed, although a hole of about two feet by two feet had already been knocked out in the wall and is now covered by a piece of plywood (see photograph). Pending the determination of the present dispute the appellants had installed the ATM within its own premises. However, the signboards on and above the glass panel surrounding the premises had already been installed. But the neon sign of appellants' logo at the exterior of the western parapet wall was removed by the appellants under protest. By Originating Summons dated 18 September 1982, the appellants applied under O. 5 r. 4(2) RHC 1980 for a declaration that upon the true construction of the sale agreement dated 17 November 1980:

(a) the appellants were entitled to install an Automated Teller Machine (ATM) in their said premises without any approval of the respondents or at all and without any payment of rental to the respondents;

(b) the appellants were entitled to install, affix and exhibit their signboard or logo with neon signs or spot lights on the exterior walls of their said premises without any approval from the respondents and without payment of any rental to the respondents and subject only to approval of the relevant government or local municipal authority for that purpose.

The appellants' application was dismissed by Vohrah J. On the installation of the ATM the learned Judge held that making a rectangular hole through the wall of the premises facing the corridor of the main entrance of the Plaza *per se* involved an 'alteration' to the premises within the meaning of s. 5.14 of the agreement. After giving careful consideration to the meaning of the word 'alteration' as expounded in *Bickmore v. Dimmer* [1903] 1 Ch D 158, he held that the installation altered the form and structure of the wall of the premises and therefore would require the consent of the respondents under s. 5.14. The learned Judge also held the view that the installation attracted the provision of s. 6.06 and that the words "competent authorities" in that section include the respondents and therefore the respondents' approval was required for such installation. As regards the installation, affixing and exhibiting the signboard and logo with neon or spot lights, the learned Judge also interpreted the words "competent authorities" in s. 7.04 to include the respondents.

On the rights of the appellants to install the ATM through the wall facing the corridor of the main entrance, we are in agreement with the learned Judge's conclusion that by virtue of s. 5.14 of the sale agreement, make a hole through the wall and installing the ATM in the manner proposed was an 'alteration' and therefore required the consent of the respondents. Section 5.14 provides:

> The purchaser shall not make any alterations or execute any improvements to the Premises without the consent of the relevant local authority and the Vendor provided always that the Vendor shall not withhold its consent unreasonably.

Applying the normal and ordinary meaning of the words used, we find no difficulty in concluding that under Article V of the sale agreement the appellants had covenanted with the respondents not to make any alteration or execute any improvement to the parcel of premises without the consent not only of the relevant local authority but also the consent of the vendor. On the issue put before us, we are not concerned with the proviso to s. 5.14, and as such the question of whether the respondents had withheld consent unreasonably by imposing annual rentals need not be determined in the present proceedings. In our view installing the ATM in the manner proposed by the appellants would constitute not only an alteration but also an improvement to the parcel of business premises. The installation of the gadget would benefit the appellants as their customers need not enter the bank premises when withdrawing money from the corridor of the Plaza. Further, we are also posed with the pertinent question of whether the appellants had any ownership right at all to the exterior wall as a purchaser as opposed to a lessee. The question is, did the sale include the whole wall both interior and exterior? If the sale included the whole wall, then it would follow that it belonged to the appellants and they could do whatever they wanted with it without the consent of the respondents. In this respect *Bickmore v. Dimmer (ante) and Sturge v. Hackett* [1962] 3 All ER 166 must be distinguished as there the Court of Appeal was dealing with a landlord and tenant situation, whereas we are dealing with the sale of a parcel of property in a multistorey building involving common areas and common boundary with other parcel of premises in the same complex. Under s. 155 of the National Land Code, after any subdivision has been approved (which is the case here) the Chief Surveyor shall prepare a plan delineating the several storeys of the building to be subdivided for the purpose of obtaining subsidiary or strata titles. For the purpose of the preparation of any such plan, it is provided by sub-section (3) of s. 155 that the boundary of any parcel of a building with any other parcel or with any part of the building which is not included in any of the parcels, shall except in so far as it may have been otherwise provided in the relevant storey plan, be taken to be the centre of the floor, wall or ceiling, as the case may be. When subsidiary title is eventually

issued in this particular case, it is more than probable that the common boundary of the appellants' premises separating it from the common areas or any other parcel of premises in the building complex would be the centre of the wall. As such the exterior wall and certainly the wall facing the common corridor where the ATM was to be installed, could not possibly belong to the appellants unless it is so provided in the relevant storey plans. The burden in this case is on the appellants as plaintiffs to show that the common boundary is not the centre of the wall. In the absence of the Surveyor's storey plan showing the contrary, we are of the view that the centre of the wall separating the appellants' premises from common areas and any other parcel in the building must in accordance with s. 155 (3) NLC be the centre of the wall and consequently the appellants have no proprietary rights to the exterior part of the wall to their premises except such rights as may be provided in the sale agreement. If any alterations or improvements were to be made to the premises, the appellants must under s. 5.14 get the consent of the respondents apart from the consent of any relevant local authority. In this case we find that the proposed installation of the ATM would involve both alteration and improvement to the premises, and in addition, by making a hole through the wall facing the main corridor, the appellants had gone beyond the common boundary. Since the ownership of the exterior wall remains with the respondents, their consent is required for the use of such wall.

We must, however, express our disagreement with the learned Judge's finding that the words "competent authorities" both in ss. 6.06 and 7.04 of the sale agreement should include the respondents. Apart from s. 5.14, the learned Judge held the view that s. 6.06 also applied to the question of the installation of the ATM. We have already expressed our view on the interpretation of s. 5.14. We now proceed to give our reason why s. 6.06 is not applicable. That section deals with "deviation of plans" and it is in the following terms:

> If during the course of construction of the Premises the Purchaser shall require any deviation to be made of the specifications or if it shall require any addition or other work to be done in or about the Premises the Vendor shall on the written request of the Purchaser and subject to the approval of the Vendor and the Appropriate Authority carry out such work PROVIDED that the extra cost of such work including the Vendor's Architect's fees and supervision fees are paid to the Vendor within fourteen (14) days from the date of the Vendor's request for payment before such work is carried out. Notwithstanding anything herein this section contained, the Purchaser shall be at liberty, subject to the approvals by the competent authorities, to carry out such alterations and installations as may be required at the Purchaser's own cost to enable the Premises to be used as a bank. In the event that the Purchaser shall engage its own contractors and/or workmen to execute such alterations and installations, no fees or charges shall be payable to the Vendor.

The opening words of the section makes it implicit that the deviation of plans should be confined to those which are made during the course of construction of the premises and not after completion. On the facts of the present case the installation of the ATM was to be installed after the premises had been completed and certificate of completion already issued by the architect (see Ex. CSS3 at p. 38). The words "notwithstanding anything herein this section contained" emphasize that the proviso entitling the appellants "to carry out such alterations and installations as may be required at the purchaser's own cost to enable the premises to be used as a bank", must be limited to alterations and installations during the course of construction. Any alteration or installation after completion of the premises should be governed by s. 5.14. This interpretation is also consistent with the fact that s. 5.14 comes under Article V relating to "Covenants by Purchaser with Vendor", whereas s. 6.06 comes under Article VI relating to "Covenants by Vendor with Purchaser". The former consists of

undertakings by the appellants not to make any alteration or improvement after the premises are completed; whilst the latter contains undertakings by the respondents to allow alteration and installation during the course of construction of the premises.

On the second issue regarding installing, affixing and exhibiting the appellants' signboard and logo on the exterior wall of the premises, s. 7.04 of the agreement specifically confers such a right to the appellants. It is in the following term:

> Subject to the approval of the competent authorities the Purchaser shall be entitled to affix and/or exhibit only on the exterior and interior of the Premises the Purchaser's signboard and logo, and not on any other part of the Centre.

It should be noted that both ss. 6.06 and 7.04 contain the requirement of approval of 'competent authorities' which was not defined in the sale agreement as opposed to the term Appropriate Authority'. The learned Judge's reasoning in coming to the conclusion that 'competent authorities' should include the respondents was expressed thus:

> The provisions of this particular sentence relate to deviation or additional works which would be carried out by the Vendor obviously with its approval and that of the Appropriate Authority which has been defined as 'any governmental, semi or quasi-governmental and/or statutory departments, agencies or bodies.' The provisions of the second sentence of s. 6.06, with which we are more directly concerned, relate to alteration and installation works which are to be carried out by the Purchaser but subject to the approval of the 'competent authorities', an expression which has not been defined. Does this expression with a small 'c' and a small `a' mean the two entities referred to in the first sentence or does it mean some institutionalised or professional entity as suggested by Counsel for the purchaser? Having regard to the reference in the first sentence of s. 6.06 to the two entities 'Vendor' and Appropriate Authority' I am of the opinion that it is not unreasonable to conclude that what was intended by the parties by the expression 'competent authorities' in the second sentence relating to similar types of additional works entailing some deviation from the plans where these works are to be undertaken by the Purchaser itself must be the same two entities whose prior approval is required.

Basing himself on the same argument, the learned Judge also held that the 'competent authorities' in s. 7.04 must also include the respondents. Thus, at the last page of his judgment, he said:

> In view of my finding as to the meaning of the expressions 'competent authorities' in s. 6.06 I think a *fortiori* it is only reasonable that the parties must have intended the same meaning as that in s. 6.06 to be attached to the expression in a provision which follows in the immediately succeeding section of the same agreement. Accordingly, I am of the opinion that the approval of the Vendor apart from that of the Appropriate Authority must first be obtained before the Purchaser can install its signboard and logo on the exterior walls of its premises and in the result I hold that the Purchaser is also not entitled to the declaration which is sought in terms of prayer (b) of its application.

We regret we are unable to agree with the learned Judge's reasoning. Having regard to our conclusion earlier as to the scope and effect of s. 6.06, we find it obvious from the plain words used that the parties intended to make different provisions for (a) alterations and installations during the course of construction of the premises (s. 6.06); (b) alteration or improvement after completion of the premises (s. 5.14); and (c) affixing and/or exhibiting signboard and logo on the exterior and interior of the premises after completion (s. 7.04). In the case of (a) and (c), only the approvals of 'competent authorities' are required. In the case of (b), the consent of both the relevant local authority and the respondents is required. In our view, the term 'competent authorities' must be given its ordinary meaning. If the parties

had intended such term should include the respondents and as well as "Appropriate Authority" as defined in the agreement then they should have expressed themselves clearly in the agreement. The Court should not extend the meaning of "competent authorities" merely because the term is not defined in the agreement or simply because the parties have used small letters 'c' and 'a' instead of capital 'C' and 'A'. In our view, whatever might be the reason for using small letters 'c' and 'a' or for omitting to define the term "competent authorities", it cannot possibly include Chi Liung Holdings Sdn. Bhd. - the respondents. The words "competent" and "authorities" whether spelt in small or capital letters must be given their ordinary meaning. In *Brazier v. Skipton Rock Co. Ltd.* [1962] 1 All ER 955 @ 957 and *Gibson v. Skibs A/S. Marina* [1966] 2 All ER 476 @ 478, the term "competent" person came up for interpretation. In both cases it was held that since there was no definition of this term it was obviously to be taken to have its ordinary meaning. Similarly in the present appeal, the term "competent authorities" though not defined should be given its ordinary meaning. The word "competent" is defined in the **Shorter Oxford English Dictionary** to mean "legally qualified or sufficient". It also means "properly qualified; within one's rights; legitimate"; whilst the word "authority" is defined in the same Dictionary to mean: "(i) power or right to enforce obedience; moral or legal supremacy; the right to command or give an ultimate decision, (ii) derived or delegated power; authorization"; whilst the **Oxford Companion to Law** defines the word "Authority" to mean "a person or body having legal powers in a particular sphere, e.g. licensing authority, local education authority, or planning authority". Even if the learned Judge was correct that "competent authorities" in s. 6.06 should include the respondents, that section, as stated earlier, is confined to deviation plans during the course of construction of the premises and should have no bearing on the scope and effect of s. 7.04 on the subject of signboard and logo. In the context of s. 7.04 "competent authorities" must refer to government or local authorities competent to approve and regulate the display of signboards and logo on commercial buildings. The term "competent authorities" in s. 7.04 and in the 'notwithstanding provision' of s. 6.06 must mean authorities competent to give such approval and such authorities cannot possibly include the respondents. Indeed, we cannot find any distinction is intended in the agreement between "Appropriate Authority" and "competent authorities". We think they mean the same thing in the agreement. In the circumstances we are of the view that although the common boundary of the appellants' premises is the centre of the wall and that the appellants do not own the exterior wall, s. 7.04 expressly entitled the appellants to affix and exhibit their signboard and logo on the exterior wall of the premises but not on any other part of the Plaza, and this they can do subject only to the approval of competent authorities, but no approval of the respondents is necessary.

For the above reasons, we allow the appeal only in part. As far as the installation of the ATM is concerned, the order of the learned Judge is affirmed, but as regards the installation and exhibition of signboards and logo on the exterior wall of the appellants' premises, the appeal is allowed and to this extent the order of the learned Judge is set aside.

As regards costs, we order that each party should bear its own costs both here and the Court below and the deposit should be refunded to the appellants.

Also found at [1985] 1 CLJ 48